

Service Date: February 26, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER of the Application of)	UTILITY DIVISION
Eclipse Communications Corporation,)	
Pursuant to 47 U.S.C. Section 252(e) of the)	DOCKET NO. D97.12.244
Telecommunications Act of 1996 for)	
Approval of its Interconnection Agreement)	ORDER NO. 6049
with U S WEST Communications, Inc.)	

FINAL ORDER APPROVING INTERCONNECTION AGREEMENT

I. Introduction and Procedural Background

On February 8, 1996, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act") was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to the local exchange telecommunications market. The 1996 Act requires companies like U S WEST Communications, Inc. (U S WEST) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251(c) and 252(a).

U S WEST and Eclipse Communications Corporation (Eclipse) negotiated an interconnection contract after Eclipse requested contract negotiations. The agreement is entitled "Interconnection Agreement" (Agreement).

Eclipse submitted the interconnection agreement to the Montana Public Service Commission (Commission) for approval on December 22, 1997. The parties' Agreement was reached through voluntary negotiations and requires Commission approval prior to implementation pursuant to 47 U.S.C. § 252(e). The Commission must approve or reject the Agreement no later

than March 22, 1998, 90 days following the request for approval, or it will be deemed approved. 47 U.S.C. § 252(e)(4).

On January 12, 1998, the Commission issued a Notice of Application and Notice of Opportunity to Intervene and Comment. The Notice established January 20, 1998 as the deadline for intervention and limited intervenors to addressing the grounds for Commission action identified in Section 252(e)(2)(A) of the Act. The Notice stated that no public hearing was contemplated by the Commission unless requested by an interested party by January 20, 1998. The Notice further stated that comments were required to be filed no later than February 4, 1998. The Commission's public notice also advised interested parties in the geographic areas affected by the Agreement that intervention in the proceeding was limited and that Montana Consumer Counsel (MCC), the only permitted intervenor, could be contacted to represent consumer interests.

Rather than negotiate a separate interconnection agreement with U S WEST, Eclipse elected to opt into the Interconnection Agreement between Sprint Communications Company L.P. and U S WEST that was approved by the Commission on November 25, 1997. As part of the materials submitted with its Application, Eclipse included a copy of the parties' signed

"Agreement to Adopt Arbitrated Interconnection Agreement," which is evidence of its intent to adopt the Sprint/U S WEST agreement in its entirety.¹

Upon review of the Agreement, the Commission makes the following findings, conclusions and order.

II. Applicable Law and Commission Decision

1. The Interconnection Agreement between U S WEST and Eclipse provides for, *inter alia*, interconnection by means of collocation, entrance facilities or meet point arrangements; the exchange of traffic between U S WEST and Eclipse; compensation for transport and termination of such traffic; the use of interim and permanent Number Portability; the purchase of U S WEST's retail services for resale; the acquisition of unbundled network elements from U S WEST; Eclipse customer access to operator assistance, Directory Assistance and E911 service; access to poles, conduits and rights-of-way; access to operational support systems and myriad other arrangements necessary for Eclipse's provision of competitive local exchange services.

2. Eclipse has elected to opt into the Sprint/U S WEST Interconnection Agreement, which the Commission approved on November 25, 1997.

¹The Agreement to Adopt Arbitrated Interconnection Agreement, in its title and in corpus, purports to adopt an interconnection agreement achieved through Commission arbitration. In fact, the Commission did not arbitrate any unresolved issues presented by Sprint and U S WEST. Sprint's petition for arbitration was subsequently withdrawn when the parties reached a fully negotiated agreement. The Commission approved the Sprint/U S WEST agreement in D97.8.160 on November 25, 1997. This voluntarily negotiated agreement is the agreement that Eclipse has agreed to adopt and which has been filed with the Commission for approval in this proceeding.

3. The Commission must approve or reject the parties' agreement, with written findings as to any deficiencies, no later than March 22, 1998. 47 U.S.C. § 252(e)(1) and (4). Section 252(e)(2)(A) limits the grounds for rejection of an agreement reached by voluntary negotiation:

(2) GROUNDS FOR REJECTION - The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(A)] if it finds that:

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

4. Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the state commission's authority is preserved in § 252(e)(3) to establish or enforce other requirements of state law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to § 253 of the 1996 Act which does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

5. Unlike an agreement reached by arbitration, a voluntarily negotiated agreement need not comply with standards set forth in Section 251(b) and (c). Significantly, standards set forth in § 251(c) and which this agreement may have been negotiated "without regard to" include the following:

(c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS. --In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(2) INTERCONNECTION.--The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carriers' network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection; and

(D) on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

47 U.S.C. § 251(c). This section and § 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in § 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission. By approving the Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that §§ 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

6. This Agreement contains no provision that would restrict customers from changing providers should their accounts be "in arrears," a clause which has been rejected by the Commission in agreements for resale of services between U S WEST and other providers.

7. When parties execute an interconnection agreement and one or both parties submit it to the Commission for approval, the Commission must approve or reject it (in whole or in part) according to the standards in § 252 of the 1996 Act--to determine if it discriminates against a

carrier not a party to the agreement or is inconsistent with the public interest, convenience and necessity. The Commission can reject portions of the agreement, but it cannot require additional provisions. If the Commission does not act within 90 days to approve or reject the Agreement, the Agreement will go into effect as is on March 22, 1998, and be deemed approved.

8. The Commission recognized in Order No. 6030, Docket No. D97.8.160, that the Agreement may need to be modified to reflect the outcome of the Eighth Circuit decision. Sprint and U S WEST have agreed in § 2.2 of the Agreement that negotiations will not be "unreasonably delayed, withheld, or conditioned." Because Sprint and U S WEST have provided for timely commencement of negotiations, the Commission did not order negotiations be completed in a time certain.

9. As with the Sprint/U S WEST Agreement adopted by Eclipse, the Commission finds that the terms in the parties' Agreement appear to conform to the standards required by the 1996 Act, with the exception of the contract provisions described and rejected below. The terms are the same as those terms in the Sprint/U S WEST Agreement, which the Commission approved on November 25, 1997. Similarly, this Agreement raises certain concerns as described below.

The Commission rejects the following provisions:

10. Dispute Resolution - Section 36.29 beginning on p. 107 sets forth the parties' agreement pertaining to resolution of disputes arising under the Agreement. It provides that such disputes may be brought to the Commission through its informal or formal complaint processes or may be referred to negotiation and arbitration under the procedures provided in the Agreement. It includes detailed and extensive arbitration provisions. While the parties are free to provide for dispute resolution in this manner according to the 1996 Act, the resolution arrived at by the

arbitrator may not be consistent with the public interest, convenience and necessity. The Commission concludes that this contract provision should be rejected because it does not provide for notification to the Commission of issues to be arbitrated or of the subsequent decision reached by the arbitrator. The public interest and the facilitation of market entry is better served by such notification. The parties may amend this section of the Agreement to include this language.

11. Remedy for Non-Payment of Undisputed Billed Amounts - Section 31.8.7 sets forth in detail the remedy for non-payment to U S WEST by Eclipse. It provides that if Eclipse fails to make payments of undisputed amounts on dates and times specified, U S WEST may, 30 days after providing written notice to Eclipse, refuse additional applications for service and/or refuse to complete any pending orders for Eclipse service at any time thereafter. It further provides that if U S WEST does not discontinue services on the date specified in the notice and noncompliance continues, "nothing contained herein shall preclude U S WEST's . . . right to discontinue the provision of the services to Eclipse without further notice." If Eclipse does not pay U S WEST pursuant to the terms of this section, Eclipse's end user customers' services could be in jeopardy of being disconnected through no fault of the end users.

12. This section contains no provision for notification to the Commission of a pending disconnection of service to an indeterminable number of end users. U S WEST must follow certain Commission rules prior to terminating service to its own end users--as must Eclipse. If notified of a pending termination of service to Eclipse's customers, the Commission can act appropriately. It is not consistent with the public interest to permit U S WEST to terminate service to Eclipse's end users with no notification to the Commission. The Commission rejects § 31.8.7 of the parties' Agreement. The parties may amend this section of the Agreement to

include a provision that allows for a reasonable notification to the Commission that will afford the Commission time in which to take any appropriate action to protect end users.

13. Construction - Section 31.5.7 of the Agreement (p. 82) states:

Resold services are available where facilities currently exist or are provided in the future as part of U S WEST's normal course of business operations for its end users and are capable of providing such services without construction of additional facilities or enhancement of existing facilities. However, if Eclipse requests that facilities be constructed or enhanced to provide resold services, USWC will review such requests on a case-by-case basis and determine, in its sole discretion, if it is economically feasible for USWC to build or enhance facilities. If USWC decides to build or enhance the requested facilities, USWC will develop and provided to Eclipse a price quote for the construction. If the quote is accepted, Eclipse will be billed the quoted price and construction will commence after receipt of payment.

The Commission finds that this provision could conflict with the public interest and should be rejected because there may be circumstances which arise where U S WEST, pursuant to its duties as a carrier of last resort, is required by law to construct facilities. The parties may amend this section to address this concern. The agreed upon terms may apply for instances where U S WEST has no carrier of last resort responsibilities.

14. The Creditworthiness Database: (Section 36.38 on pp. 113-114) This section provides that both Eclipse and U S WEST will make available certain customer payment history information--for each person or entity that applies for local service or intraLATA toll services from either carrier--to a mutually agreed upon third-party credit reporting agency. The information to be reported includes the applicants name, address and previous telephone number, if any; the amount of any unpaid balance in the applicant's name; whether the applicant is delinquent on payments; the length of service with the prior local or intraLATA toll provider; whether the applicant had local or intraLATA toll service terminated or suspended within the last six months

(including an explanation of the reason therefor); and whether the applicant was required by the prior local or intraLATA toll provider to pay a deposit or make an advance payment, or provide another form of security including the amount of each. This section would permit customer credit information to be reported to a credit reporting agency without the customer's authorization and should be rejected.

15. If the database is used for determining whether a deposit should be required of the applicant, it is not consistent with Commission rules. It includes information that is pertinent to some of the Commission's deposit rules, but not to all of them. In rejecting a provision intended for this purpose in some resale agreements previously reviewed by the Commission, we expressed our concerns for customer privacy and increased opportunity for anticompetitive conduct. Although the rejected language was much different, this provision raises similar concerns for customer privacy.

16. Further, it establishes a means for Sprint, Eclipse and U S WEST--but no other telecommunications provider--to obtain useful information about potential customers. Such a database, if implemented, should be available to all telecommunications carriers and should be established by a proceeding which includes industry participants, consumer representatives and other interested parties.

17. The Commission rejects this section because it is not consistent with Commission regulations, it is otherwise not consistent with the public interest, convenience and necessity, and it discriminates against carriers who are not parties to the Agreement.

18. Customer Authorization: Section 31.3.11.1 on pp. 79-80 applies to the unauthorized switching of providers (slamming). It provides that the procedures may be superseded or

modified by FCC rules or industry standards and requires Eclipse to produce a record consistent with FCC rules in the event of a slamming dispute. The Commission rejects this entire section because it does not comply with Montana law and Commission rules on slamming. The parties may amend these sections to include Montana law and Commission rules.

III. Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA. Eclipse is a provider of regulated interexchange telecommunications services in the State of Montana, and will also be regulated when it begins offering local exchange service in Montana as a competitive local exchange carrier.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The Commission has jurisdiction to approve the Interconnection Agreement negotiated by the parties and submitted to the Commission for approval according to Section 252(e)(2)(A). Section 69-3-103, MCA.

4. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. See generally, the Telecommunications Act

of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending scattered sections of the Communications Act of 1934, 47 U.S.C. § 151, et seq.). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

5. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

6. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the U S WEST/ Eclipse Agreement by March 22, 1998, or the Agreement will be deemed approved.

IV. Order

THEREFORE, based upon the foregoing, it is ORDERED that the interconnection Agreement between U S WEST Communications, Inc. and Eclipse Communications Corporation is approved as discussed herein, subject to the following conditions:

1. The parties may file an amendment to the Agreement without delay consistent with the Commission's decision in this proceeding.
2. The parties shall file subsequent amendments to their Agreement with the Commission for approval pursuant to the 1996 Act.

DONE AND DATED this 24th day of February, 1998, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.